

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

FILED  
UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

03 MAY 27 PM 4: 21

JAMES SEABA and  
CORY PHILLIPS,

Plaintiffs,

*R. M. Marsh*  
CLERK-ALBUQUERQUE

v.

Civ. No. 02-103

**LH/RHS**

MESOSYSTEMS TECHNOLOGY, INC.,

Defendant.

**PLAINTIFFS' MOTION TO COMPEL DEFENDANT TO CONDUCT A  
COMPLETE SEARCH OF ALL ELECTRONIC ASSETS FOR  
DOCUMENTS RESPONSIVE TO DISCOVERY REQUESTS AND TO  
PRODUCE LAPTOP COMPUTER FOR INSPECTION**

Plaintiffs respectfully request that the Court enter an Order, pursuant to Fed.R.Civ.P. 37, compelling Defendant to conduct a complete search of all of its computer files, servers, work stations, and other electronic assets for documents responsive to Plaintiffs' Requests for Production of Documents, and for costs and fees associated with bringing this Motion. As grounds for this Motion, Plaintiffs state:

On July 12, 2002, Plaintiff James Scaba served his First Request for Production to Defendant. Defendant served its objections and Responses to Plaintiff James Scaba's First Request for Production on August 13, 2002.

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On September 6, 2002, Plaintiff Cory Phillips served his First Request for Production to Defendant. Defendant served its objections and Responses to Plaintiff Cory Phillips' First Request for Production on October 22, 2002.

On April 4, 2003, Plaintiffs' counsel took the deposition of Dr. Charles Call, Defendant's CEO. At his deposition, Dr. Call testified that he did not know whether MesoSystems searched any of its archived computer and electronic files for documents responsive to Plaintiffs' discovery requests. *See* Exhibit A hereto, deposition of Charles Call, p. 54, ln. 12 – 23. Dr. Call later testified that the laptop computer that he was using in 2001 had "crashed" and that none of his e-mail or other electronic files were backed up on MesoSystems' server. *Id.*, p. 106, ln. 1 to p. 108, ln. 9. Significantly, all of the events that are at issue in this case occurred during 2001. Dr. Call then testified that he thought that the laptop he had been using in 2001 was thrown away, although MesoSystems did try to recover some data from it. *Id.*, p. 108, ln. 10 to 18.

In response to this information, Plaintiffs' counsel noticed a Rule 30(b)(6) deposition for the MesoSystems' representative who could address electronic data storage issues. On May 16, 2003, Plaintiffs' counsel took the deposition of Ms. Samantha League who was designated by Defendant to testify on its behalf in response to the Rule 30(b)(6) Notice. At her deposition, Ms. League testified that MesoSystems' server contains historical data going back through 2001. *See* Exhibit B hereto, Deposition of Samantha League, p. 24, ln. 6 – 9; and p. 24, ln. 24 to p. 25, ln. 6. In response to Plaintiffs' discovery requests in this case, Ms. League was asked to coordinate the search for certain electronic

documents. She accomplished this by asking various individuals to search on their computers for responsive e-mails. *Id.*, p. 32, ln. 9 – 19. Ms. League did not give any of these individuals specific instructions on which files they should search in. *Id.*, p. 32, ln. 20 to p. 33, ln. 3. Significantly, Ms. League conceded at her deposition that she does not know whether the individuals she contacted searched their deleted items folders, their temporary folders, their archive folders, or their “sent item” folders for responsive materials. *Id.*, p. 33, ln. 4 to p. 34, ln. 9; and p. 35, ln. 13 – 16.

Ms. League further testified that she did not conduct a complete search of MesoSystems’ server for responsive documents. *Id.*, p. 40, ln. 5 to p. 44, ln. 13.

Contrary to Dr. Call’s testimony, Ms. League testified that his “crashed” laptop is still available in Albuquerque. *Id.*, p. 44, ln. 23 to p. 45, ln. 7. She also testified that she was able to retrieve at least some documents from this computer. *Id.*, p. 45, ln. 8 to p. 46, ln. 7. While searching for documents responsive to Plaintiffs’ discovery requests, however, she did not search the documents that she had been able to retrieve from Dr. Call’s computer. *Id.*, p. 46, ln. 11 – 23.

By letter dated May 22, 2003, Plaintiffs’ counsel asked counsel for Defendant to provide assurance that Defendant would conduct a complete search of its electronic files for documents responsive to Plaintiffs’ prior discovery requests. *See* Exhibit C hereto, letter dated May 22, 2003 from Angelo J. Artuso to Paul E. Smith. To date, Plaintiffs’ counsel has received no response from Defendant.

By letter dated May 27, 2003, Plaintiffs' counsel also asked Defendant for permission to have Plaintiffs' computer forensic expert examine Dr. Call's crashed computer to determine whether additional documents might be recovered. *See* Exhibit D hereto, letter dated May 27, 2003 from Angelo J. Artuso to Alberto Leon. Due to the pending deadline for discovery motions, counsel asked for a response by noon, May 27, 2003. As of the time this Motion was filed, no response had been received.

Fed.R.Civ.P. 34 provides that any party may serve a request for production on any other party to permit the inspection and copying or any designated **documents** "including writings, drawings, graphs . . . and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form . . . ." Computer documents and files clearly fall within the scope of materials that must be produced in response to a Rule 34 request. *See, e.g., Playboy Enterprises v. Welles*, 60 F.Supp.2d 1050, 1053 (S.D.Cal. 1999) ("by requesting 'documents' under Fed.R.Civ.P. 34, Plaintiff also effectively requested production of information stored in electronic form.").

In instances where deleted files may be recoverable, the courts have permitted the requesting party to actually inspect the computer itself. *Id.* In this instance, the files on the computer that Dr. Call used throughout 2001 (the critical time period for this case) may contain retrievable files. Plaintiffs should be permitted the opportunity to have their forensic expert examine the computer and determine which files may be recovered.

WHEREFORE Plaintiffs respectfully request that the Court enter its order requiring Defendant to conduct a complete search of their electronic document and file assets for materials responsive to Plaintiffs' requests for production, requiring Defendant to produce the laptop used by Dr. Charles Call in 2001 for inspection and data retrieval by Plaintiffs' forensic computer expert, awarding Plaintiffs' fees and costs incurred in bringing this Motion, and providing such other and further relief as the Court may deem just and proper.

MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.

By: Angelo J. Artuso  
Lisa Mann  
Angelo J. Artuso  
Attorneys for James Seaba and Cory Phillips  
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Albuquerque, New Mexico 87103-2168  
Telephone: (505) 848-1800

WE HEREBY CERTIFY that a true  
and correct copy of the foregoing pleading  
was mailed to the following counsel of  
record this 27<sup>th</sup> day of May, 2003:

Alberto A. Leon  
Post Office Box 30684  
Albuquerque, New Mexico 87190-0684

Paul E. Smith  
One Bellevue Center  
Suite 1800  
411-108th Avenue N.E.  
Bellevue, WA 98004-5584

MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.

By: Angelo J. Artuso  
Angelo J. Artuso

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1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF NEW MEXICO

3 JAMES SEABA and CORY PHILLIPS,

4 Plaintiffs,

5 vs. No. CIV-02-0103 LH/WWD

6 MESOSYSTEMS TECHNOLOGY, INC.,

7 Defendant.  
8  
9

10 EXCERPT OF THE DEPOSITION OF CHARLES J. CALL  
11 April 4, 2003  
12 9:00 a.m.  
13 500 Fourth St., NW

14 PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE  
15 this deposition was:

16 TAKEN BY: ANGELO J. ARTUSO  
17 ATTORNEY FOR THE PLAINTIFFS  
18  
19  
20  
21  
22  
23  
24  
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EXHIBIT

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1 into any sort of network?

2 A. Yes.

3 Q. Okay. And is there a server of some sort that

4 serves the network, I take it?

5 A. Yes.

6 Q. Okay. Are your files from your laptop backed up

7 on the server regularly?

8 A. Yes.

9 Q. Does MesoSystems regularly archive the files

10 that are on its server?

11 A. I believe so.

12 Q. Do you know whether, in response to the  
13 discovery that's been served in this case, whether any  
14 search of the archived computer files has been made by  
15 MesoSystems for responsive E mails and documents?

16 A. Can you restate the question?

17 Q. Yes. Do you know whether, in response to the  
18 discovery that we've served in this case, whether the  
19 subpoena or the request for production or the  
20 interrogatories, has anyone at MesoSystems looked through  
21 the archived electronic files to determine whether there  
22 was responsive material?

23 A. I don't know.

24 MR. ARTUSO: We would ask that that be

25 determined, Alberto, and make sure that we've done a



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1 MR. LEON: Angelo, this may be a good juncture.

2 During the lunch hour, the witness became -- or  
3 recollected some information that pertains to some of the  
4 issues that you asked him this morning about computers,  
5 and I would like him to clarify the record.

6 Q. (By Mr. Artuso) If you would like to amplify  
7 your prior or, you know, amend your prior answers, please  
8 do so.

9 A. Well, it's additional information, I think.

10 Q. That would be fine.

11 A. The server -- you asked do we do backups on my  
12 computer. The answer is, yes, we do them, but we've only  
13 been doing them for about a month. Prior to that, there  
14 were no backups on my computer. And in addition to that,  
15 I had two computers, two Sony laptops, crash on me about a  
16 year ago. The one I had been using up until -- I don't  
17 remember the exact time. Let's just say February or  
18 January or something. The one I'd been using for the last  
19 couple of years, the hard drive failed, and I lost  
20 everything, and I wasn't doing backups, so that I had a --  
21 a previous backup was one that had been done maybe months  
22 and months before that happened.

23 And then I borrowed an old one that Lisa had  
24 had -- I didn't borrow it. My new computer became one  
25 that was sitting on the shelf which was an old computer,

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1 no longer being used by another employee, in this case  
2 Lisa Albrect, and I began using that one as my primary  
3 computer. And two months later that one crashed again and  
4 I went and bought a brand new computer.

5 So the computer I'm using now was one that I got  
6 about a year ago, sometime in the spring of last year and  
7 hadn't been doing any backups on it until very recently.  
8 Now we have a process whereby backups are made on my  
9 computer onto the server, but during those prior periods  
10 there wasn't any, and so I was explaining this to Alberto  
11 over lunch.

12 Q. Is it your testimony that Meso didn't have a  
13 server until a month ago?

14 A. Meso had a server, absolutely, but the server  
15 has -- was -- I was located in Washington, and even though  
16 we had a server here, my E -- the only thing that would  
17 have got backed up would have been E mail, and my E mail  
18 is what's -- I'm not an expert at this, okay?

19 So my -- I think the right terminology here is  
20 my E mail is popped to me. There -- it's a protocol, and  
21 the reason mine is done that way is because when I'm on  
22 travel I use AOL as a way to get in, a personal account as  
23 a way to get access to the net, and when you do E mail  
24 that way, your E mail is not archived in the same way that  
25 the other E mails who use what's called exchange.

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1       So you have an exchange server, or you can have  
2       your E mail popped, and mine is popped, and in that  
3       situation it's not really on -- there isn't archives of it  
4       kept. It's only when you go to the exchange process that  
5       it is. So I was just sort of a legacy guy on our server  
6       because most of the other employees are on an exchange  
7       server, and because I've always since the day we've  
8       started company been doing AOL and popping my E mail I've  
9       never converted over to the process.

10      Q. What did you do with the Sony laptop that you  
11      were using in 2001 that died?

12      A. I think we threw it away. Yeah, I know we -- we  
13      tried -- we tried to recover the data, and just started  
14      over.

15      Q. And it's your understanding that none of the E  
16      mail that you received or sent during that time period  
17      would be on server tapes or server backup?

18      A. That's my understanding.

19      Q. And who did you get that understanding from?

20      A. From our IT person.

21      Q. Who is that?

22      A. Phil. I can't remember Phil's name here.  
23      Ferguson.

24      Q. What do you recall about your meeting with  
25      Dr. Seaba in Portland, Oregon?

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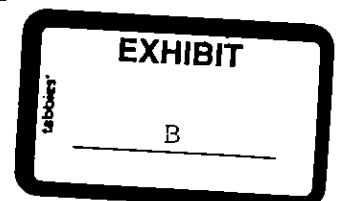
1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF NEW MEXICO

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4       JAMES SEABA and CORY PHILLIPS, )  
5                                   Plaintiffs, )  
6                                   )       Civ: No.  
7       vs.                                )       02-103-LH/WWD  
8       MESOSYSTEMS TECHNOLOGY, INC., )  
9                                   Defendant. )  
10

11  
12                   DEPOSITION OF SAMATHA LEAGUE  
13       Taken at the instance of the Plaintiffs  
14  
15

16   May 16, 2003  
17   1:30 p.m.  
18   415 N. Quay  
19   Kennewick, Washington  
20  
21

22  
23                   BRIDGES & ASSOCIATES  
24       Certified Shorthand Reporters  
25                   P. O. Box 5999  
                  Kennewick, Washington 99336  
                  (509) 735-2400 - (800) 358-2345



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- 5 A. It's on the server.
- 6 Q. Okay. So the server has a
- 7 historical record that may go back months or
- 8 however much storage capacity it has?
- 9 A. That's correct. I can clarify here,
- 10 okay?
- 11 Q. Sure.
- 12 A. I'm going to use finance data,
- 13 because it seems to be easiest. I can have a
- 14 finance data folder that is 50 mega bites.
- 15 Every day there's a transaction made in
- 16 finance, in the finance software, and it saves
- 17 on that database.
- 18 Q. Right.
- 19 A. So three months from now I might not
- 20 have 50 megabytes, I might have 75 megabytes.
- 21 Q. Right.
- 22 A. But I still have a record of that
- 23 very first megabyte that I ever had.
- 24 Q. Okay. Now, where is that server
- 25 now, the 2001 data that's getting slugged to

SAMATHA LEAGUE - by Mr. Artuso

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- 1 the server every day, where is it now?
- 2 A. That server is in this building in
- 3 our server room.

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4 Q. Okay. And so it would still have  
5 data on it from 2001?

6 A. That's correct.

7 Q. Let's talk about E-mail. I come  
8 into the office, I have my laptop computer, I  
9 plug into the wall, I enter my password, I am  
10 working away happily during the day. And I  
11 decide I'm going to send an E-mail to somebody  
12 in Albuquerque, and I know they are not on the  
13 network, so I am going to have to go through  
14 the internet and send it.

15 Right?

16 A. That's incorrect.

17 Q. Okay. How would I send an E-mail to  
18 someone in Albuquerque back in 2001 with my  
19 plugged in laptop?

20 A. At MesoSystems we used the E-mail  
21 Client Outlook. The Outlook settings were set  
22 for an E-mail firm, I guess, they provided  
23 E-mail services to us called Pacific Networks.

24 Q. Is that the name of the firm?

25 A. That is the name of the company that

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1 provided our E-mail.

2 Q. Okay. And are they like an internet

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1 for.

2 Q. Okay. Look at this one. This one  
3 says, "Please produce a copy of all documents  
4 that refer to, relate to or are otherwise  
5 concerned with any communication, whether  
6 written or verbal, between you and Dr. Janes  
7 James Seaba."

8 A. Okay.

9 Q. Do you remember looking for  
10 documents that referred to Dr. Seaba,  
11 communications with Dr. Seaba?

12 A. Yes.

13 Q. Okay. Where did you look for them?

14 A. For communications between  
15 MesoSystems and Dr. Seaba, I asked folks to  
16 look for E-mail and send any E-mails that they  
17 had to me.

18 I compiled those. And sent them on  
19 to Lisa, if I am remembering correctly.

20 Q. Did you give them any specific  
21 direction as to where they were supposed to  
22 look for E-mails?

23 A. In their own E-mail systems and on  
24 their own computers.

25 Q. Okay. And did you give them any

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1 specific instructions as to where on their  
2 computers they should be looking for them?

3 A. No.

4 Q. Okay. So, do you know whether or  
5 not they all searched for their deleted files,  
6 for example?

7 MS. ANDRADE: Objection to the  
8 form. It calls for her to speculate as to what  
9 other people did. But if you know for a fact  
10 what other people did, you can answer.

11 THE WITNESS: I don't know what  
12 individual people did.

13 Q. (BY MR. ARTUSO:) Okay. So it's  
14 possible that they may have missed E-mails that  
15 reside in a deleted file or resides in a temp  
16 file or resides anywhere other than in their in  
17 box. If all they looked for it in their in  
18 box, it is possible they may have missed  
19 something, is that correct.

20 MS. ANDRADE: I am going to  
21 object. That is a mischaracterization. I  
22 don't think she specified that they only looked  
23 in their in box.

24 Q. (BY MR. ARTUSO:) You don't know  
25 where they looked, is that right?



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1 A. That's correct.

2 Q. And now if you delete an E-mail off  
3 of your active file, it goes into a deleted  
4 file, right?

5 A. Correct.

6 Q. Okay. And if you don't look in your  
7 deleted file, you are not going to file the  
8 E-mail, right?

9 A. Probably not.

10 Q. Now, did you send out just a system  
11 wide request for people to look for  
12 communications involving Dr. Seaba, or did you  
13 ask specific individuals?

14 A. I don't remember if I asked specific  
15 individuals or if I sent a mass announcement  
16 out.

17 Q. If you had sent out a mass  
18 announcement, would that have been by E-mail?

19 A. Yes.

20 Q. Okay. So you could check and see,  
21 hopefully, you know. You use Outlook for your  
22 E-mail system, is that right?

23 A. Yes.

24 Q. And so there is a sent items folder?

25 A. Yes.

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1 Q. And is your Outlook, does it auto  
2 archive files?

3 A. My personal Outlook does auto  
4 archive. In addition to that, I have to  
5 conserve resources, company resources. I don't  
6 keep E-mail indefinitely. So, I could, or  
7 could not. You know, I don't know that I could  
8 produce that.

9 Q. Okay. Now, if I understood you  
10 correctly, you didn't offer any specific tips  
11 or specific instructions for anyone when you  
12 asked for them to serve for E-mails.

13 So is it fair to say that you did  
14 not ask them to check their archive files on  
15 their own hard drives?

16 A. No, I did not.

17 Q. What efforts did MesoSystems make to  
18 preserve electronic file E-mail sent  
19 information once this lawsuit was filed? Did  
20 it take any specific steps to make sure that  
21 that data was being preserved?

22 A. I am not aware of anything that we  
23 did out of the ordinary.

24 Q. Is there anything that you would do  
25 in the ordinary which would be specific to a  
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1 lawsuit having been filed in an attempt to  
2 preserve data?

3 A. I don't know what -- I don't know  
4 that we did anything different. I don't know  
5 that anything was backed up specifically for  
6 this lawsuit.

7 Q. Did MesoSystems take any of the key  
8 laptops, and I am thinking -- well, let me back  
9 up. Mr. Lubeck, does he use a laptop or  
10 desktop?

11 A. At the time he used a laptop.

12 Q. Okay. Mr. Schalla in 2001, did he  
13 use a laptop or a desktop?

14 A. He used a laptop.

15 Q. Okay. And Dr. Call used a laptop?

16 A. Yes, sir.

17 Q. Okay. And Dr. Chellappa, did he use  
18 a laptop?

19 A. He used, in 2001, I believe he used  
20 a desktop.

21 Q. Okay. Did MesoSystems take any  
22 steps to take those laptops out of service or  
23 to preserve them or to do anything with their  
24 hard drives to make sure you had a good, clean

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25 copy of how they look at the time the lawsuit

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1 was filed?

2 A. No.

3 Q. Okay. So the individuals with those  
4 laptops, the three that we talked about that  
5 had laptops, Dr. Schalla, Dr. Chellappa, and  
6 Dr. Call, all continued to use their laptops?

7 A. That's correct.

8 Q. Does MesoSystems have any sort of a  
9 software designed to wipe its hard drives  
10 clean?

11 A. No.

12 Q. Do you have a policy with respect to  
13 what kind of software can be loaded up on the  
14 system, or are the engineers and scientists  
15 pretty much allowed to run amuck, run whatever  
16 they want on their particular machines?

17 A. For specific computers, no, we don't  
18 have rules as to what they can or can't put on  
19 the machines.

20 Q. Does MesoSystems have a voice mail  
21 system?

22 A. Individual buildings do have a voice  
23 mail.

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22 a local officer here in Kennewick that you  
23 would call?

24 A. Yes.

25 Q. So you don't know where the message

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1 would reside or how long it would stay on the  
2 system or how it would be backed up or anything  
3 like that?

4 A. No.

5 Q. When you received requests to look  
6 for documents from Ned Godshall or Charles Call  
7 or anyone else responsive to this case, did you  
8 search the network server that has primarily  
9 financial and contract data on it?

10 A. If what they asked me for pertained  
11 to finance or data that I thought would be on  
12 the server, then, yes, I searched those areas.

13 Q. Did you do that personally or did  
14 you ask someone else to do it for you?

15 A. I would do that personally.

16 Q. Okay. And explain to me how you  
17 went about your search. What is it that you  
18 would ask -- or let me back up.

19 where is it that you would ask the  
20 server to look for responsive information? was  
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21 it in an active files, archived files? where  
22 were you looking for stuff?

23 A. It depended on what I was asked to  
24 look for.

25 Q. All right.

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1 A. If I was asked for a copy of an  
2 offer letter, I would go to the Human Resources  
3 file and I would pull up their offer letters.

4 Q. Human Resources file would be on the  
5 server?

6 A. Yes.

7 Q. Okay. Now, we looked at a request  
8 for production that said all documents that  
9 referred to or relate to any communication  
10 between Dr. James Seaba and MesoSystems. Let's  
11 look at that request by itself.

12 A. Okay.

13 Q. How would you have searched for  
14 responsive documents on the server to respond  
15 to that request?

16 A. I would first of all go, I would  
17 pull information that has to do with their  
18 hiring paperwork. Any letters that were on  
19 letterhead would be kept on the server or in

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20 our letter book file. I went to both of those  
21 locations. Anything that was to Jim Seaba or  
22 for Cory Phillips, I pulled it and had it  
23 available.

24 For E-mail, I asked individuals to  
25 look, and any correspondence that they had

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1 individually with either of those gentlemen,  
2 and asked them to send those to me. I compiled  
3 them. As I recall, I sent them to Lisa in  
4 Albuquerque.

5 Q. Okay. Now, if I worked in Human  
6 Resources and I typed up a letter to someone,  
7 let's say Dr. Seaba, and I presented it out and  
8 I saved it and I decided I wanted to save it to  
9 the Human Resources database file on the  
10 server, with me so far?

11 A. Uh-huh.

12 Q. And then later on I decide as I am  
13 working in that file, well, I don't need to  
14 keep that letter anymore, can I delete it?  
15 It's stored on the server. Can I delete it?

16 A. Yes.

17 Q. Okay. When I do that, it's going to  
18 be sent to a deleted file, right?

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19 A. Correct.

20 Q. In your search did you query the  
21 deleted file for items that were responsive to  
22 the request?

23 A. Not that I recall.

24 Q. Now, some programs make a temporary  
25 file, and they do that automatically, right?

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1 A. Yes.

2 Q. If I were in Human Resources and I  
3 typed a letter to Dr. Seaba or Dr. Phillips,  
4 and subsequently decided I wasn't going to send  
5 it, for whatever reason, but I saved it sort of  
6 in draft form, and I decided, well, I am not  
7 going to send it, and then came back later and  
8 decided to delete it because I wasn't going to  
9 send it, is it possible that a copy of it might  
10 still exist in a temporary file on the server?

11 A. I suppose it's possible.

12 Q. Okay. Now, --

13 A. I'm going to back up there.

14 Q. Okay.

15 A. I know that it's not possible,  
16 because we upgraded that server in 2002, and  
17 the only things that we moved over to the new



w0301037.txt

18 hard drives were intact files, like our Human  
19 Resources, our finance files, our contracts  
20 file.

21 So anything that would have been in  
22 a temp directory would not have been  
23 transferred over.

24 Q. Where are the old hard drives, the  
25 ones you were use anything 2001? where are

SAMATHA LEAGUE - by Mr. Artuso

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1 they now?

2 A. They are in our server loop.

3 Q. So it could be possible to look on  
4 those old hard drives for temp directories to  
5 see if there is anything that might be  
6 responsive to the request there, right?

7 A. Yes.

8 Q. Okay. When you were looking for  
9 responsive documents, did you do that, did you  
10 go to the old 2001 hard drives and look in like  
11 a temp directory to see if there might be  
12 responsive materials?

13 A. No. If I could ask, when is the  
14 date of those requests for? If it was before  
15 we moved those files, there would have been no  
16 need to go back to old hard drives.

w0301037.txt

17 Q. I can find the date. It was July or  
18 August of 2002. And would that have been after  
19 the new hard drives were put into the server?

20 A. July 25th, 2002, sticks out in my  
21 mind as the day that we changed those hard  
22 drives.

23 Q. Okay. Now, Dr. Call testified that  
24 he had a laptop in 2001, and that it crashed,  
25 became nonfunctional.

SAMATHA LEAGUE - by Mr. Artuso

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1 Were you aware of that?

2 A. The only crashed hard drive -- or  
3 crashed computer that Chuck had that I'm aware  
4 of happened in March or early April of 2002.

5 Q. Okay. Where is that computer now?

6 A. To my knowledge that computer is in  
7 Albuquerque, New Mexico.

8 Q. Okay. And was any effort made to  
9 try and recover the hard drive of that  
10 computer, any of the data on that hard drive?

11 A. Absolutely. Yes.

12 Q. Okay. And who undertook that job to  
13 try and recover the data on that hard drive?

14 A. I did initially.

15 Q. Okay. And what were the results?

w0301037.txt

16 what were you able to accomplish?

17 A. I was able to get partial documents  
18 from his My Documents folder. I was not able  
19 to retrieve any of his Outlook file.

20 Q. Any other data or document that you  
21 were able to retrieve from that hard drive?

22 A. The condition of that hard drive was  
23 such, Chuck -- It would only boot up like one  
24 out of ten tries. So he said if we could get  
25 his My Documents files and his Outlook files,

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1 that that was the most important thing. And  
2 that's what I concentrated on, were those two  
3 things.

4 Q. Did you try to recover the temp  
5 files or the deleted files?

6 A. I tried to recover his My Documents  
7 folder and his Outlook files only.

8 Q. Okay. And that computer is still in  
9 Albuquerque, as far as you know?

10 A. As far as I know, it is.

11 Q. When you were looking for documents  
12 that were responsive to the request for  
13 production, did you go back and check what you  
14 were able to recover from that hard drive, see

w0301037.txt

15 if there were any responsive documents?

16 A. I would not have had those files.

17 what I was able to recover was put on a disk or

18 CD and sent to Albuquerque. So I would not

19 have had those.

20 Q. Okay. Do you know whether anyone

21 looked at the disk or CD?

22 A. I don't know if the folks in

23 Albuquerque looked for that or not.

24 Q. Who would have possession of that

25 disk or CD?

SAMATHA LEAGUE - by Mr. Artuso

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□

1 A. I imagine Chuck would.

2 Q. Now, Dr. Call testified that he had

3 one SONY laptop that crashed, so he ended up

4 using or borrowing Lisa Albrecht's SONY laptop,

5 and that it crashed a few months later.

6 Does that ring a bell at all?

7 A. No. The only one I am aware of is

8 in March or early April, 2002.

9 Q. Okay.

10 A. And I don't know who it originally

11 belonged to.

12 MR. ARTUSO: Why don't we take

13 a five minute break. I think I am almost done.



MODRALL SPERLING

L A W Y E R S

May 22, 2003

VIA FAX (425) 453-7350

Paul E. Smith  
Perkins Coie  
One Bellevue Center  
411-108th Avenue, N.E., Suite 1800  
Bellevue, WA 98004-5571

Angelo J. Artuso  
505.848.1894  
Fax: 505.848.1891  
aja@modrall.com

Re: Seaba, et al. v. MesoSystems Technology, Inc.

Dear Mr. Smith:

At the 30(b)(6) deposition last week, it became apparent that MesoSystems has failed to conduct a thorough search of its electronic files for documents responsive to our prior discovery requests. For example, Ms. League testified that she did not conduct a search of any temporary files or directories, did not search any "sent items" folders, did not have individuals responding to her requests search for any "deleted" items, and did not search Mr. Call's former "crashed" hard-drive. I provide these as examples. There are additional areas and resources set forth in the deposition (we are still waiting for the transcript) where a search for responsive documents should be made by MesoSystems..

Please let me know whether MesoSystems will now undertake such a search, or whether we will need to file a Motion to Compel next Tuesday. Thank you for your assistance and I look forward to your response.

Sincerely,

Angelo J. Artuso

c: Lisa Mann  
Jim Scaba  
Cory Phillips

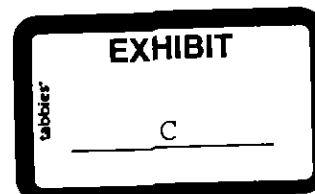
0300603

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**VIA FACSIMILE TRANSMISSION TO: 883-3194**

May 27, 2003

Alberto León  
Bauman, Dow, McIntosh & León  
P. O. Box 30684  
Albuquerque, New Mexico 87190-0684

Re: Seaba, et al. v. MesoSystems

Dear Mr. León:

With respect to MesoSystems' most recent responses to James Seaba's second request for production, I have the following questions and concerns:

**Request for Production No. 1** - Please let me know when we will receive a copy of check nos. 9704 and 9571.

**Request for Production No. 2** - I have attached a draft copy of our Motion to Compel Defendant's Discovery Responses. As you can see from the attached motion, we are seeking entry of the draft Protective Order that we sent to you on April 16, 2003, as well as an order compelling MesoSystems to produce those documents that it has indicated it will not produce absent an appropriate protective order. Because the deadline for discovery motions is today, I ask that you please let me know by no later than **Noon today** whether we need to add Request for Production No. 2 to the attached motion, or whether you will produce documents responsive to this request once the court has entered the appropriate protective order.

**Request for Production No. 4** - I believe that you waived any attorney/client privilege and/or work product protection for private investigator files when you attached the affidavit of Robert Hamic to your motion to supplement your reply memo in support of motion to dismiss or transfer for improper venue. If I am not mistaken, you further waived any protection for the private investigator files when you cited his findings to the court at the hearing on the motion to dismiss or to change venue. In light of these waivers, I ask that you please reconsider your objections to Request for Production No. 4. Again, I

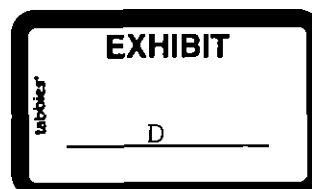
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Alberto Leon  
April 29, 2003  
Page 2

need to know by **Noon today** whether you will agree to produce responsive documents.

**Request for Production No. 5** - You are incorrect in asserting that plaintiffs have made no allegations in their First Amended Complaint related to RTI. In fact, plaintiffs have asserted that, as a result of MesoSystems' improprieties in charging time and materials on Department of Defense contracts (on which RTI was a participant), they were terminated. Thus, documents related to RTI are directly relevant to the matters at issue in this case. Also, you indicate that you will not produce responsive documents absent an appropriate protective order. Please see my discussion regarding Request for Production No. 2 above, and let me know by **Noon today** whether I need to add Request for Production No. 5 to the current motion, or whether you will agree to produce responsive documents once a protective order has been entered.

**Request for Production No. 6** - Please see discussion regarding Request for Production No. 5 above.

Finally, at her deposition on May 16, 2003, Samantha League testified that Dr. Call's old laptop computer is still here in Albuquerque, New Mexico. Ms. League also testified that she attempted to recover some of the files from that computer. We would like to have our expert, Brooks Hilliard, examine the hard drive of Mr. Call's old computer to determine whether, with his software and methods, he might be able to recover additional files. Please let me know by no later than Noon today whether you will permit such an inspection.

Thank you for your assistance with these matters.

Sincerely,

  
Angelo J. Artuso

AJA\jev\K:\dox\client\65518\112\W0300970.WPD  
Enclosure

cc: Lisa Mann, w/o encl.  
James Seaba, w/o encl.  
Cory Phillips, w/o encl.



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